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No. 268

In the Supreme Court of the United States

October Term, 1956

PHILLIPS PETROLEUM CO., APPELLANT

v.

WISCONSIN ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 262

PEERLESS STAGES, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE GREYHOUND CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission, issued in a consolidated proceeding. The order required appellant to cease and desist from unlawful charter party operations, and denied appellant's application for a certifi-

cate of public convenience and necessity to extend its motor-carrier bus authority to include special or charter operations.

This litigation involves the transportation of passengers from points in the San Francisco Bay area to gambling casinos in the Reno-Carson City-Lake Tahoe area of Nevada. Prior to the instant proceeding, appellant held no specific authority to perform this service, but conducted such operations under color of the incidental charter party provisions of Section 208(c) of the Interstate Commerce Act, 49 Stat. 552, 49 U.S.C. 308(c).[1] On December 3, 1958, appellant applied for a certificate specifically authorizing special or charter operations, over irregular routes, from the Bay area to points in Nevada, Arizona, New Mexico and Utah. On March 16, 1959, before ruling on the application, the Commission instituted an investigation to determine whether appellant was engaged in the transportation of passengers in violation of its outstanding certificate and the incidental charter party provisions of the Act,[2] 49 U.S.C. 306(a) and 308(c). (J.S. App. A, A2–A3).

[1] Section 208(c) provides: "Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

[2] The investigation also inquired into the activities of one Travis and another Parsons, acting as brokers in violation of Section 211 of the Act, 49 U.S.C. 311. Travis was found to be operating as a broker without a license and was ordered to cease and desist. He did not appear as a party to contest the Commission's order in the district court case.

After hearing on a consolidated record, a California and Nevada Joint Board established under Section 205(b) of the Act found that appellant's operations were in violation of Section 208(c) and the regulations issued thereunder, and recommended that a cease and desist order be issued. In the application proceeding, a hearing examiner recommended denial of the certificate on the ground that public convenience and necessity do not require the proposed operations.

On exceptions, Division 1 of the Commission disposed of both proceedings in a single report, adopting the recommendations of the joint board and of the examiner. (J.S. App. A, A2–A17). It held (J.S. App. A, A17), that appellant did not transport "special or chartered parties" within Section 208(c) of the Act but, on the contrary, its operations violated the rules and regulations of the Commission issued under that section and the provisions of Section 206(a). Appellant was ordered to cease and desist such unlawful operations. The validity of the cease and desist provision of the order was sustained by the district court (J.S. App. B, A18–A19), and is no longer contested (J.S. 2, 7–8, 13).

In the application case, the Commission held (J. S. App. A, A16–A17), that appellant "failed to establish that the present or future convenience and necessity require the proposed operations." Rejecting appellant's challenges, the three-judge district court unanimously upheld the order in a per curiam judgment (J.S. App. B, A18–A19). The court concluded that the Commission "applied the proper standard in determining whether or not there

was a present or future convenience and necessity for granting complainant a license expanding its activities and in the application of said test properly concluded that there was no showing that the existing service was not adequate."

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. It involves only the Commission's factual determination, affirmed by the district court, that the present or future public convenience and necessity has not been shown to require the proposed operation.

1. Appellant initially complains (J.S. 13, 16, 18) about being treated as a *new* competing carrier and being put to the burden of showing that the existing carrier (Greyhound) is unable, or unwilling, to furnish adequate service. Recognizing that a prospective competitor must establish the necessity for granting a duplicating certificate,[3] Peerless argues

[3] The prospective competitor must show, not only that a proposed service is required in the convenience of the public, but, also, that it is a necessity, which determination turns on the adequacy or inadequacy of existing facilities and service to meet the transportation needs of the public. *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S.D.N.Y.), affirmed, 338 U.S. 802. This standard has been consistently applied by the Commission, with this Court's approval, since the original enactment of Section 207(a) in 1935. See, *e.g.*, *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 69; *American Trucking Ass'ns.* v. *United States*, 344 U.S. 298, 312–313; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535–536; and *United States* v. *Detroit and Cleveland Nav. Co.*, 326 U.S. 236, 241. The ruling in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, specifically limited to contract carrier applications under Section 209(b), is inap-

that this rule was inapplicable in the premises because, unlike the usual applicant, it was not a newcomer to the routes or the traffic, having, in fact, conducted the very operations in question for some considerable time before its application was filed.

'The flaw in appellant's argument is that it would overlook the illegality of the operations sought to be relied on. As already noted, the Commission dedetermined, and the court upheld the ruling, that the Peerless operations between the San Francisco Bay area and the Nevada gambling casinos were authorized by neither Section 207(a) nor Section 208(c) of the Interstate Commerce Act, but, on the contrary, were unlawful, violating Section 206(a) and the Commission's regulations issued under Section 208(c). Having acquiesced in the cease and desist order, appellant cannot now contest that determination. And since, obviously, no carrier can be permitted to gain an advantage through illegal conduct, appellant is foreclosed from invoking past operations to overcome its burden as a prospective competitor.'

Realizing its predicament, Peerless seems to argue that, unlike a flagrant violator who would have no standing to pose as an existing carrier, it is a mere

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posite. That decision was expressly grounded on a recent amendment establishing new and special criteria to control the disposition of such applications.

'This is not to say that appellant's illegal operations must be ignored in determining the need for additional service. The Commission recognized their relevance on this point (J.S. App. A, A16). But, of course, merely because an interloper succeeds in enticing business away from the licensed carrier, it does not follow that two carriers are necessary.

technical offender, now seeking to regularize its existing service, and, accordingly, should not be penalized for past violations. In connection with this contention, appellant complains about the supposed difficulty of appreciating the difference between permissible incidental "special or chartered parties service" authorized by Section 208(c) and the type of operation for which a special certificate is required under the proviso to Section 207(a). It would serve no purpose to repeat all the distinctions. Suffice it to say that the differences, on analysis, are quite clear, and are well recognized in the transportation industry.[5] The Commission's finding that Peerless was engaged in unauthorized operations was based on admitted facts, and its reasoning is fully articulated in its opinion and need not be reiterated here. The plain fact is that appellant cannot acquire standing as an existing carrier on the basis of patently illegal activity.

In denying appellant's application, the Commission found (J.S. App. A, A16–A17) that the existing carrier, Greyhound, holds authority to serve the

[5] The basic distinction between "special or chartered parties service" under Section 208(c) and "special or chartered operations" under Section 207(a) of the Act, is made abundantly clear in the report prescribing the *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, 26, 36; in Rule VI thereof, 49 C.F.R. 178.6 (J.S. App. C, A21–A22), and in numerous Commission and court decisions which appellant is presumed to know. *A. B. & W. Transit Co.* v. *United States* (E.D. Va.), 14 Fed. Car. Cases, Par. 81,395, and cases cited; *Crescent Express Lines, Inc.* v. *United States*, 49 F. Supp. 92, 94 (S.D.N.Y.), affirmed, 320 U.S. 401, 406; *National Bus Traffic Ass'n* v. *United States*, 143 F. Supp. 689, 692 (D. N.J.), affirmed, 352 U.S. 1020.

areas in question in regular route scheduled operations as well as in special or charter operations, that it is "willing and able to adapt its service to the public's needs"; and that the witnesses testifying as to the need for appellant's proposed service have not shown that they "attempted to use the existing service available or have found such service to be inadequate in some material respect."

On the basis of its own review of the administrative record, the Court below concluded that the Commission applied the proper standard and was supported by the record. (J.S. App. B, A18). There is no occasion for a second re-examination of that record by this Court. See *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491.

2. Appellant complains (J. S. 14, 15) that the Commission's action, in effect, condones discrimination and rebating by the existing carrier. But these charges have no foundation.

There is nothing in the record indicating that Greyhound discriminates in rates or services between the casinos. Much is sought to be made of the difference between the charge of $8.80 (plus tax) offered to the Wagon Wheel Casino and the $6.77 (plus tax) charge to Harrah's Club. But the simple fact is that the first price covered normal regular route operations and was quoted before special operations, covered by an appropriate tariff, were being run from San Francisco to Harrah's Club (Tr. 420, 421, 422–423, 450–

451).* Since publication of the tariff for special operations, Greyhound has made the same rates available to all casinos at any geographical location (Tr. 338–339, 422–423). In addition, Greyhound will make the same terminal and vehicle facilities available to all casinos (Tr. 341, 422–423, 435, 438, 445, 455–456).

The claim that Greyhound participates in rebating has no foundation in fact. Greyhound collects its total published tariff charge for the service rendered and does not refund any portion to the passengers or the casinos (Tr. 441–442).

3. Finally, appellant alleges (J.S. 15, 17–18) that the Commission favored Greyhound by constantly linking appellant to the gambling casinos; disregarded the economic loss to appellant resulting from denial of the application; and ignored evidence showing that the existing traffic would support both carriers.

The first of these charges is plainly beside the point. In determining the legality of Peerless' past operations, its connection with the casinos was obviously relevant. But there was not the slightest suggestion that those operations were held unlawful *because* they involved transportation to gambling establishments. Nor can appellant properly complain of losing revenue derived from unauthorized service. Termination of unlawful operations does not support a claim that the Commission arbitrarily caused appellant to lose revenue or unlawfully confiscated its property. *United States* v. *Rock Island Co.*, 340 U.S. 419,

* "Tr." references are to the certified transcript of the record before the Commission which has been filed with this Court.

449; *American Trucking Ass'ns.* v. *United States,* 344 U.S. 298, 322–323; *Seaboard Air Line R. R. Co.* v. *United States,* 131 F. Supp. 129, 136 (E.D. Va.), affirmed, 349 U.S. 902. The last complaint presents a purely evidentiary question which the Commission, and the court below, resolved against Peerless. The determination, supported by substantial evidence, presents nothing for further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal presents no substantial question warranting further review and that the judgment of the district court is correct and should be affirmed.

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